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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 76

JESSIE WILLIAM MILLER,

Petitioner,

vs.

THE UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT.

REPLY BRIEF FOR PETITIONER.

HOWARD C. WESTWOOD,
Counsel for Petitioner.

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REPLY BRIEF FOR PETITIONER.

The respondent's brief (pp. 35-36) seeks to distinguish the state decisions cited in the petitioner's brief (p. 26) asserting that without statutory authority therefor, a court can require that an indigent defendant in a criminal case be furnished with a transcript, for the purpose of his appeal, at public expense. The respondent refers to certain statutory provisions in effect in the various states at the time of the decisions cited which seem to it to make these decisions consistent with its position in this case.

State v. *Klein*, 95 Conn. 451, 112 A. 524 (1920), was a criminal case in which the accused, a pauper, in connection with his appeal moved the appellate court to "certify all of the evidence in said cause and make it a part of the record and print the same at the expense of the state".

The Court pointed out that a state statute provided that the appellant must present to the trial court "all of the evidence desired to be certified at his expense" and must pay for printing the record; but it held that this statute would not control in the case of poor persons who, it was said, had always been provided for by the courts. Accordingly the court, under its general power to care for the poor, held that an indigent defendant in a criminal case could, in the court's discretion, be furnished with a transcript and a printed record for the purpose of his appeal at public expense.

Section 2229, *General Statutes of Connecticut* (Revision of 1918) referred to by the respondent (Br. 35), provided for an official stenographer and set his fees. One copy of the transcript was furnished to the court with an additional copy to each of the parties. The stenographer's fees for these services, including travelling expenses in certain instances, were taxed and paid as other court expenses.

Section 6681 of the same revision provided that "The defendant in any criminal case shall pay the costs of his conviction before he shall be discharged".

The opinion in the *Klein* case makes no reference to either of these sections. If reference had been made it would necessarily have been limited to a comment that the court's ruling was made in spite of—certainly not under authority of—these sections.

Jeffries v. *State*, 9 Okla. Cr. 573, 132 Pac. 823 (1913), was a criminal case in which the accused, acting through appointed counsel, sought a transcript of the evidence in order to perfect an appeal. The court agreed with the point made by the state that a transcription of the stenographer's notes was not the only means by which the record on appeal could be prepared. The court also stated that if counsel are employed by the accused, "it is their duty to

use their best exertions to make up a case-made from memory, and if they do not do so, the defendant will be held responsible for this neglect of duty on their part". But the court said the case was different when appointed counsel served, and held that the transcript could be furnished without expense to the accused.

As indicated in the respondent's brief (p. 36) sections 1785-1788, *Oklahoma Revised Laws* (1910), at the time the *Jeffries* case was decided, provided for official court reporters and required them to furnish transcripts to paupers free. But the court in its opinion in the *Jeffries* case chose not to rely on these sections—no mention is made of the sections in the opinion—but rather based its decision on the fundamental constitutional right. In the course of its opinion the court said:

> "It is a violation of both the letter and spirit of this provision of the Constitution to require any man to pay any costs of court if he is a pauper and without the means of doing so, and to deny him the issuance of such process or the services of the officers when he is unable to pay for the same. In other words, justice in Oklahoma is the right of the poor as well as the luxury of the rich.
>
> * * * We want the people of Oklahoma to understand, one and all, that the poorest and most unpopular person in the state, be he white or black, can depend upon it that justice is not for sale in Oklahoma, and that no one can be deprived of his right to appeal simply because he is unable to pay a stenographer to extend the notes of the testimony". (132 Pac. at 823, 824)

A similar conclusion was reached by the court in *State ex rel Parmenter* v. *District Court of Ravalli County*, 111 Mont. 453, 455, 110 P. (2d) 971, 972, (1941), where a state statute on the subject was found to be merely a recognition of the fundamental constitutional guarantee.

In re Morgan, 122 Ind. 428, 23 N. E. 863 (1889), was a criminal case in which the accused was denied a transcript of the evidence by the trial court. The appellate court affirmed the denial on the ground that the accused was not entitled to a transcript as a matter of right—that the matter was within the discretion of the trial court, but pointed out that a case might arise in which it would be error not to make an "allowance" for the payment of the cost of preparing a transcript of the stenographer's notes.

As indicated in the respondent's brief (p. 36), Section 1405 *Indiana Revised Statutes* (1881), at the time of the court's decision provided for salaried court reporters, and Section 260 required court officers in a pauper's case to "do their duty without taking any fee or reward therefor from such poor person".

Section 260 also provided for the appointment of counsel for poor litigants, including criminal defendants, and provided that counsel should also serve without reward from "such poor person". Comparing the holding in *Knox County Council* v. *State*, 217 Ind. 493, 29 N. E. (2d) 405 (1940), and the earlier cases cited therein that counsel appointed to conduct the defense of a poor person accused of crime cannot by statute be required to serve without compensation but, regardless of statute, will be paid by the state (Petitioner's Brief pp. 24, 26) with the language of the court in the *Morgan* case that upon a proper showing an "allowance" could be made for the cost of transcribing the stenographer's notes, we must conclude that the court in the *Morgan* case was not referring to the existing statutes, but rather, as it did in the *Knox County* case, was finding a broad, inherent power in the courts to do justice without reference to specific legislative directives on the point, even though expenditures of public funds might be necessary.

The respondent cites certain other state decisions (Br. 53) as holding in the absence of statute that a defendant in a criminal case will not be furnished with a transcript of the evidence at public expense.

State v. *Vicknair*, 118 La. 963, 43 So. 635 (1907), was a criminal case in which the accused instead of securing the services of the official court reporter had brought his privately employed stenographer to court for the purpose of taking notes on the testimony. The prosecuting officer objected to this procedure at the opening of the trial. When the accused found himself unable to pay his stenographer for transcribing the notes, he requested the court to order the stenographer to perform this service without charge.

The court, after referring to the fact that the stenographer involved was not the official court reporter, ruled that it had no authority as between the private parties concerned to require one to perform services for the other without charge. In affirming, the appellate court said:

> "Inasmuch as the stenographer was the private stenographer of the accused, working under a private agreement with him, we do not see how the judge could have ruled differently." 43 So. at 639.

There was no discussion or analysis of the court's power in the event the stenographer had been the official court reporter. The inference that the ruling might have been different is clear.

Altis v. *State*, 109 Neb. 776, 192 N. W. 327 (1923), was a contempt proceeding arising out of a failure to pay support money in a divorce action. The court specifically refused to pass on the question whether the contempt proceeding was a criminal action.

Contrary to the implication in the respondent's brief (p. 53) this case was principally concerned with the interpretation of a statute under which the trial court was given

discretion to order a transcript of the stenographer's notes at public expense. The principal question discussed by the court was the extent of the discretion left to the trial judge. The court held that the statute provided only that the trial court "may" make the allowance and that the trial court was not under obligation to incur the expense in every case. The court in stating its conclusion said:

> "If, however, the proof is sufficient to support the application, then, of course, it is the duty of the court or judge to grant the order." 192 N. W. at 328.

In passing the court said that the relief sought was statutory, but since the statute in question merely restates the inherent power of the court, it is submitted that the case is hardly an authority for the respondent's position here.

The respondent also states in brief that *United States* v. *Gildersleeve*, 193 U. S. 528 (1904), is not contrary to its position here since the moneys involved were the clerk's statutory fees under R. S. 828. The respondent implies that it is unimportant that the record in that case in the Court of Claims [1] shows that work performed by the clerk in earning these fees involved preparing a transcript of the stenographer's notes on the evidence since this court considered the matter solely from the point of view of the statutory fees.

In the *Gildersleeve* case the respondent's brief in this Court shows very clearly that this Court knew that the services performed by the clerk were not his usual services in preparing a record on appeal. The respondent stated in his brief that "he would probably not have the time in connection with his own duties to prepare the transcript per-

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[1] Pertinent portions of this record are included in this reply brief as Appendix A.

sonally, and would have to employ and pay a copyist to do the work". Moreover, the respondent in his brief referred to the case of *Goodrich* v. *United States*, 42 Fed. 392 (E. D. Ark., 1890), where the fees for making transcripts required by Section 10 of the Act of March 3, 1887, 24 Stat. 507, when ordered by the district attorney were held to be chargeable to the United States. A reference to the statute referred to in the *Goodrich* case discloses that the transcript involved there included a transcript of the evidence.

Consequently the *Gildersleeve* case recognized and approved the exercise by a district court of its inherent power to provide an indigent defendant in a criminal case with a transcript of the evidence for the purpose of his appeal at public expense. That the payment therefor was to occur through having the Government pay fees to the clerk, who in turn would have to pay for the work of transcription, is immaterial.

The respondent makes much of the fact that specific statutory authorization is necessary for expenditures of the nature desired by the petitioner in this case (Br. 28-38).

But courts have frequently asserted an inherent power to incur expenses necessary to the conduct of their business. *Stowell* v. *Jackson*, 57 Mich. 31, 23 N. W. 557 (1885), involved the action of the trial court in segregating the jury and ordering that the hotel expenses incurred in such segregation be paid by the state. In the course of an opinion approving this expenditure, the appellate court said:

> "It is within the legislative power to arrange specifically how all these matters should be disposed of; but as the law now stands, the inherent power and duty of courts to exercise their functions must authorize such action as becomes expedient in the course of judicial business.
>
> "The fact that there are not many authorities on this subject rather tends to indicate acquiescence in this practice than otherwise. * * *" 23 N. W. at 558.

See also *In re Janitor of Supreme Court*, 35 Wisc. 410 (1874), court may appoint janitor at public expense; *Board of Commissioners* v. *Gwin*, 136 Ind. 562, 36 N. E. 237 (1894), court may order repairs to court house; *State ex rel Kitzmeyer* v. *Davis, State Controller*, 26 Nev. 373, 68 Pac. 689 (1902), court may order furniture for courtroom; *Knox County Council* v. *State*, 217 Ind. 493, 29 N. E. (2d) 405 (1940), court may order county to pay appointed counsel. Such cases as *Sargent* v. *State*, 11 Ohio Rep. 472 (1843); *Fernekes* v. *Supervisors of Milwaukee County*, 43 Wisc. 303 (1877); and *County Commissioners of Alleghany County* v. *County Commisisoners of Howard County*, 57 Md. 393 (1882) illustrate the inherent power in the courts to incur expense in connection with feeding and caring for jurors. Compare *United States* v. *Fox*, 19 F. Supp. 463 (S. D. N. Y., 1937), where it was held that a court may require that compensation for the services of a pauper defendant's expert witness in a criminal case be paid from the appropriation for miscellaneous expenses of the United States Courts, relying upon the spirit of 28 U. S. C. A. §656; and 21 Comp. Gen. 347 (1941), where Comptroller General ruled that the appropriation for miscellaneous expenses of the United States Courts would be available to pay expense of taking a deposition of a witness for a pauper defendant in a criminal case (including stenographic transcription) where witness is within the territorial limits fixed by 28 U. S. C. A. §656.

Respectfully submitted,

HOWARD C. WESTWOOD,
CHARLES M. DAVISON, JR.,
Counsel for Petitioner.

APPENDIX.

Portions of Record in Court of Claims in the case of *Gildersleeve* v. *United States*

In the District Court of the First Judicial District of the Territory of New Mexico:

No. 1620

THE UNITED STATES OF AMERICA

vs.

JAMES ADDISON PERALTA REAVIS.

Conspiracy.

The Clerk of the First Judicial District Court of the Territory of New Mexico will please immediately prepare a full, true and complete transcript of all the proceedings in the above entitled cause, for review in the Supreme Court of the Territory of New Mexico, consisting of all the pleadings, exhibits and record entries, and testimony in connection with the trial of said cause, and will also cause all the stenographers' minutes to be transcribed.

CHARLES A. SPIESS,
Attorney for Defendant.

IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT OF THE TERRITORY OF NEW MEXICO.

No. 1620

THE UNITED STATES OF AMERICA

vs.

JAMES ADDISON PERALTA REAVIS

Conspiracy.

James Addison Reavis being duly sworn on his oath says, that he is the plaintiff in error in the case of *James Addison*

Reavis v. *The United States of America*, in which case a writ of error has been sued out from the Supreme Court of the Territory of New Mexico, to the District Court of the First Judicial District of the Territory of New Mexico; that he is informed that the fees of the Clerk of said District Court for making and certifying a complete record in said cause will be about $400.00; that he is entirely without means with which to pay the said Clerk for such service, and that he knows of no source from which he can procure or obtain the amount or any amount of money to defray the expenses in perfecting his said appeal to the Supreme Court of the Territory of New Mexico; and that if he cannot obtain the said transcript of said record without paying the Clerk of said District Court his said fees therefor, he will not be able to present his said cause to the said Supreme Court.

(Signed) JAMES ADDISON REAVIS.

Subscribed and sworn to before me this 28th day of October, A. D. 1896.

GEORGE L. WYLLYS,
Clerk of the District Court of the First Judicial District of the Territory of New Mexico. (*Seal of District Court.*)

No. 1620

THE UNITED STATES

vs.

JAMES ADDISON REAVIS, Alias James Addison Peralta-Reavis, Alias James Addison Peraltarieaves, and Jose Migiul Noé.

Conspiracy.

Upon reading the affidavit of the defendant and it being made to appear to the satisfaction of the court that the said defendant, James Addison Reavis, is unable to provide funds for the preparation of the transcript of record of his

said case for review by the Supreme Court of the Territory of New Mexico;

It is ordered by the court that the Clerk of this court prepare said transcript with all convenient speed and transmit the same duly certified to the Clerk of the Supreme Court of the Territory of New Mexico.

(Signed) N. B. LAUGHLIN,
Associate Justice, etc.

UNITED STATES OF AMERICA,
Territory of New Mexico,
First Judicial District:

I, A. M. Bergere, Clerk of the First Judicial District Court of the Territory of New Mexico, do hereby certify that the foregoing three pages contain a true, correct and complete copy of the Poverty affidavit, Praecipe for transcript and Order for Clerk to Prepare Transcript in cause No. 1620 United States Court, in which the United States of America was plaintiff and James Addison Peralta Reavis was defendant.

In Witness Whereof, I have hereunto set my hand and the seal of said court at my office in the City of Santa Fe, County of Santa Fe and Territory aforesaid this 14th day of January, A. D., 1902. * * * (Seal of District Court.)

(Signed) A. M. BERGERE,
Clerk, U. S. Court.